FILED BY CLERK
DEC 18 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. THOMAS ALLEN RICE, Appellant.	2 CA-CR 2009-0108 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200800453

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART;
REMANDED FOR RESENTENCING

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass
Tucson
Attorneys for Appellee

Harriette P. Levitt
Tucson
Attorney for Appellant

E S P I N O S A, Presiding Judge.

¶1 After a jury trial, Thomas Rice was convicted of second-degree burglary and sentenced to an enhanced, aggravated term of thirteen years' imprisonment. He

contends the trial court erred both in precluding certain testimony at trial and in imposing a sentence in violation of his due process rights. Finding no error in the court's evidentiary ruling, we affirm Rice's conviction, but we vacate his sentence and remand the case to the trial court for resentencing.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Long*, 207 Ariz. 140, ¶ 2, 83 P.3d 618, 620 (App. 2004). In March 2008, while she was hospitalized, L. received a telephone call from her friend, D., who was staying in L.'s guesthouse. D. was calling from the main house to report that all the doors were open, the smoke alarms were "going off," and "things looked disarrayed and missing." While he was still on the phone, D. went through the home at L.'s request to disable the smoke alarms and noted L.'s television, surround-sound system, and computer were missing and her bedroom had been "torn apart." L. then called the police. A few minutes later, D. called L. again to tell her Rice, an acquaintance of L.'s, was in her driveway.

¶3 When Apache Junction police officers arrived, Rice was in the process of leaving the premises; he was wearing gloves and carrying a pillowcase containing several of L.'s personal belongings. One of the responding officers recognized Rice because the officer had been at L.'s home a few weeks earlier when he had assisted L. in asking Rice

to leave and informing him he was no longer welcome in her home. Rice was arrested at the scene and was later charged, convicted, and sentenced as outlined above.

Discussion

¶4 Before trial commenced, Rice moved in limine to present evidence that D. had previously committed a burglary at L.'s home. Rice contended it was actually D. who committed the March burglary in connection with an "insurance scam" D. and L. were perpetrating together. In support of this theory, Rice wished to call S., an acquaintance of D.'s, who would testify about D.'s involvement in the previous burglary. He argued the alleged prior burglary was relevant to show that, when Rice arrived at L.'s home, he had stopped a burglary in progress and "chased [D.] off." Rice also claimed his own testimony would bolster S.'s testimony and advance his defense theory by showing that "he stopped [D.]" on the night of the March burglary. The court precluded the testimony citing Rule 404(b), Ariz. R. Evid., finding "such evidence would simply be introduced to show that [D.] acted in conformity [with his alleged history as a burglar] on this occasion; that specifically because he may have committed a prior unrelated burglary, he must have committed this burglary."

¶5 We will not reverse a trial court's ruling on the admissibility of other-act evidence under Rule 404(b) absent an abuse of discretion. *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007). The state points to this court's previous statement that, "Rule 404(b) . . . contemplate[s] evidence of acts of the defendant, not

those of other persons," *State v. Bloomer*, 156 Ariz. 276, 280, 751 P.2d 592, 596 (App. 1987), and argues that evidence of D.'s prior bad acts could not be admitted under this rule. But even assuming evidence of another person's prior acts are governed by Rule 404(b), we would find no abuse of discretion in the trial court's preclusion of this evidence.[1]

¶6 In proffering the evidence, Rice made only vague allusions to S.'s testimony as "evidence that there was an unrelated burglary committed against L. . . . by [D.]." But Rice made no specific offer of proof, and we have no way to know the substance of S.'s testimony. *See State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) ("[The] proponent of the precluded evidence must . . . make the offer of proof so that the reviewing court can determine whether the trial judge erred . . . ."). Rice did not offer any details of this alleged first burglary to allow the trial court to discern when it happened, how it was committed, or even if it actually occurred, let alone how it was connected to the March burglary. Based on this thin record, we cannot say the trial court

[1]Rice implicitly asks us to reject *Bloomer*, arguing that the plain wording of Rule 404(b) does not specifically refer to defendants and should render evidence of D.'s other acts admissible. Because the trial court's ruling was not an abuse of discretion even assuming Rule 404(b) is applicable to this testimony, we decline his invitation to revisit that case and resolve this question. *See Phoenix City Prosecutor's Office v. Ybarra*, 218 Ariz. 232, n.4, 182 P.3d 1166, 1169 n.4 (2008) (declining to interpret court rule when case decided on other grounds). Moreover, our supreme court has already determined Rule 404(b) applies to acts of third parties as well. *State v. Tankersley*, 191 Ariz. 359, ¶ 39, 956 P.2d 486, 496 (1998).

abused its discretion in precluding the testimony.[2] *See State v. McKenna*, 222 Ariz. 396, ¶ 17, 214 P.3d 1037, 1044 (App. 2009) (affirming preclusion when defendant did not make offer of proof regarding "what actual evidence he would have presented"); *see also State v. Dickens*, 187 Ariz. 1, 13-14, 926 P.2d 468, 480-81 (1996) (court will not overrule trial court on only "sparse record" and no offer of proof).

Sentencing

¶7 Rice next argues, and the state concedes, that the trial court wrongfully imposed an aggravated sentence based solely on factors falling under the "catch-all" category of A.R.S. § 13-701(D)(24), which allows the trier of fact to find as an aggravator "[a]ny other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime."[3] Because Rice did not raise this argument at trial, we review only for fundamental error. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d 1069, 1080 (App. 2009). "Imposition of an illegal sentence, however, constitutes fundamental error." *Id*. The jury found as aggravators that Rice needed to be deterred from future crimes, that he had lied to police

[2]The trial court gave Rice permission to argue his "insurance scam" theory to the extent it was supported by the evidence. Yet Rice did not elicit testimony from any witness about the alleged scam despite having the opportunity to cross-examine L., who Rice claimed was complicit in it.

[3]This section of the criminal code was renumbered effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 23, 24, 120. No substantive changes were made to the relevant provision, and for ease of reference, we refer to the version currently in effect.

to hinder prosecution, that he had previously spent time in prison, and that he testified falsely at trial.[4] But our supreme court recently concluded that the "[u]se of the catch-all [provision] as the sole factor to increase a defendant's statutory maximum sentence" violates the defendant's due process rights. *State v. Schmidt*, 220 Ariz. 563, ¶ 10, 208 P.3d 214, 217 (2009). Because the only aggravating factors cited by the trial court fall under this catch-all provision of § 13-701(D)(24), the trial court erred in imposing an aggravated sentence.

Disposition

¶8 Although we affirm Rice's conviction, we vacate his sentence and remand the case to the trial court for resentencing in accordance with this decision.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

[4]The jury also found as a separate aggravator Rice's prior criminal convictions. But, as the state acknowledges, these prior convictions establish that Rice is a repeat offender for sentence-enhancement purposes but cannot serve as aggravating factors under § 13-701(D)(11) because they were committed more than ten years before he committed the present offense.

ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003)